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Brief for Appelle and Amicus, State of New Union: Seventh Annual Pace National Environmental Moot Court Competition

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Civ. No. 94-214

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES DEPARTMENT OF THE INTERIOR
Appellant,
- against -
STATE OF NEW UNION
Appellee and Amicus

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW UNION

Brief for Appellee and Amicus, State of New Union*

MEASURING BRIEF

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This Brief is produced in a type size of 10 characters per inch.

* This brief has been reprinted in its original form. No revisions have been made by the editorial staff of the Pace Environmental Law Review.

QUESTIONS PRESENTED FOR REVIEW

1. Does the plain language waiver of sovereign immunity in section 118 of the federal Clean Air Act subject the Department of Interior to liability for state civil penalties imposed in response to persistent violations of a state's Clean Air Act.

2. Is judicial review of a federal agency's voluntarily prepared Environmental Impact Statement precluded by the Administrative Procedure Act, in a case in which the National Environmental Policy Act does not require the preparation of that document because of the agency's unchallenged finding that its proposed project would have no significant impact on the human environment.

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OPINION BELOW

The United States District Court for the District of New Union concluded that the Department of Interior's Coal Research Activity was liable for civil penalties assessed under the New Union Clean Air Act because the federal Clean Air Act, section 118, contains a "clear and unambiguous" waiver of sovereign immunity.

The District Court also found that the Environmental Impact Statement prepared by CRACT was subject to judicial review, despite CRACT's voluntary preparation of that document.

STATEMENT OF THE CASE

Twenty percent of the workforce of the state of New Union works in the Coal industry. (R. at 2.) Of these, 800 are em-

ployed at the Department of the Interior's Coal Research Activity (CRACT) facility in Cathertown, New Union. *Id.* The CRACT facility researches all aspects of the coal process. *Id.* The facility includes a coal mine, a transportation yard and a coal furnace. *Id.* CRACT shares its research with the coal industry. *Id.* CRACT began the Improved Coal Transport Experiment ("ICTE") in April 1985. *Id.* at 3. The ICTE program tests a new process to pack coal into barrels for shipping. *Id.* The process heats the coal to 400 degrees and then pulverizes the coal. *Id.* Workers can then pour the coal into barrels without wasting air space. *Id.* The ICTE process creates a large quantity of particulate matter which escapes into the air. *Id.* On September 30, 1989, the New Union Department of Environmental Quality (NUDEQ) inspected the CRACT facility and cited CRACT for violating the New Union Clean Air Act ("NUCAA"), a state program authorized under the federal Clean Air Act. *Id.* The NUDEQ Administrator wrote CRACT explaining the NUCAA standards and asserting jurisdiction to regulate the facility. *Id.* Despite receiving notice that ICTE violated NUCAA standards, CRACT made no change in its ICTE program. *Id.* On April 27, 1993, NUDEQ inspectors again visited the CRACT facility. *Id.* Because CRACT had not complied with the previous citation, the NUDEQ Administrator imposed \$300,000 in civil penalties. *Id.*

CRACT admitted that the facility has an obligation to comply with the substantive provisions of NUCAA. *Id.* CRACT informed NUDEQ that CRACT would build a hangar and baghouse to trap particulate matter before the air is filtered outside. *Id.* All parties agree that the proposed hangar and baghouse will bring ICTE into compliance with NUCAA. *Id.*

Although CRACT admits that the facility was obligated to meet NUCAA standards, it claims sovereign immunity prevents NUDEQ from assessing civil penalties against CRACT for past violations. *Id.* The state of New Union therefore filed suit to enforce the \$300,000 penalty. *Id.*

After CRACT decided to build the hangar and baghouse to bring the ICTE project into compliance with NUCAA standards, environmental groups became interested in the pro-

ject. *Id.* Sunpeace, one such group, is a non-profit organization which encourages solar energy research. *Id.* at 2. Sunpeace claims the coal industry pollutes the air and contributes to global warming. *Id.* Sunpeace began a media campaign criticizing the ICTE program and urging the CRACT facility be shut down. *Id.*

On June 26, 1993, CRACT published a Finding of No Significant Impact (FONSI), concluding the baghouse would not significantly impact the human environment. *Id.* at 4. Sunpeace failed to challenge the adequacy of the FONSI. *Id.* Thereafter, CRACT decided to voluntarily prepare an Environmental Impact Statement under expedited procedures. *Id.*

CRACT published the Draft EIS in December 1993 setting forth two alternatives: (1) construction of the hangar and baghouse; and (2) operation of ICTE at a reduced volume so as to meet the NUCAA standards. *Id.* Written comments were submitted by Sunpeace asserting another alternative, that of no ICTE program at all. *Id.* Sunpeace claimed discontinuance of ICTE was the "no action" alternative required by the National Environmental Policy Act (NEPA). *Id.* CRACT responded that the alternative of discontinuing ICTE was beyond the scope of the EIS and did not include the alternative in the final EIS. *Id.* In the Final EIS, CRACT selected the hangar and baghouse alternative. *Id.*

Sunpeace filed suit against CRACT, claiming the EIS is inadequate for failing to discuss shutting down the ICTE program. *Id.* Sunpeace sought review under NEPA and the Administrative Procedure Act. *Id.* The court below consolidated the action brought by Sunpeace with the action brought by New Union. *Id.*

SUMMARY OF THE ARGUMENT

Stubborn adherence to the doctrine of sovereign immunity cannot be justified in the face of a clear congressional waiver of that antiquated doctrine. Such a waiver is clearly stated by the plain language of the Federal Clean Air Act. In addition to the plain language of the Act, Congress created

compelling evidence that documents its absolute intent to waive sovereign immunity to the type of state penalty which New Union properly assessed against CRACT. This evidence is amply recorded in the legislative history of the Clean Air Act, and is corroborated by the public policy underlying the entire Act.

The plain language of the Federal Clean Air Act unambiguously waives any claim to sovereign immunity which CRACT might otherwise enjoy. Section 118 of that Act, the Federal Facilities provision, expressly waives CRACT's sovereign immunity to any and all of the civil penalties New Union properly assessed in response to CRACT's knowing, willful, and persistent state law violations. The clarity of the section 118 waiver is further bolstered by the clear intent of section 304 of the Clean Air Act, the Citizen's Suit provision, authorizing New Union to sue CRACT for recovery of civil penalties assessed under the New Union Clean Air Act.

It is difficult to imagine how the legislative history of the 1977 Amendments to the Clean Air Act could more clearly express Congress' intent to waive sovereign immunity for facilities such as CRACT. First, the House committee drafting the Amendments completely rejected its own subcommittee's attempt to limit the broad waiver of immunity which ultimately became law. Second, the Conference Committee clearly chose the broad waiver of immunity granted by the House version of the Amendments over the narrow waiver of immunity included in the Senate's version. The Conference Committee's adoption of the House version's broad waiver should eliminate any suspicion about Congress' clear intent. This legislative history thus bolsters the plain language of the Clean Air Act's express waiver of sovereign immunity for facilities engaging in the very type of violations committed by CRACT.

Public policy also militates in favor of honoring Congress' broad waiver of federal sovereign immunity. Congress reasonably and explicitly chose to hold the budgetary feet of federal agencies to the fire of state air quality law penalties. This policy forces malfeasant federal bureaucracies, which have a history of mere grudging compliance with environ-

mental laws, to not only endure budget losses from state penalties, but also the bright light of the Congressional attention ensured by such budget losses.

The Environmental Impact Statement prepared by CRACT is not subject to judicial review for compliance with the National Environmental Policy Act. CRACT completely fulfilled its NEPA requirements by properly issuing a Finding of No Significant Impact on its proposal to build a hangar and baghouse for the Improved Coal Transport Experiment. After fulfilling its NEPA requirements, CRACT voluntarily chose to prepare an EIS to inform the public more fully. This EIS is not subject to judicial review, because its preparation was a voluntary agency action entirely outside the scope of NEPA. Such discretionary agency actions are beyond the reach of judicial review under the Administrative Procedure Act.

Even if the voluntary EIS prepared by CRACT were reviewable for compliance with NEPA, the record clearly shows that CRACT took a "hard look" at all reasonable alternatives. The EIS prepared by CRACT satisfies all NEPA requirements, because NEPA only requires that CRACT consider alternatives reasonably related to the purposes of the hangar and baghouse construction project. The alternative of shutting down ICTE, now urged by Sunpeace, is clearly beyond the scope of CRACT's proposed construction project, and is therefore not an EIS alternative NEPA would require. Even if shutting down ICTE were not outside the scope of the agency's proposed project, it would still be an unreasonable alternative. This is true because the policy decision to make a huge human and economic investment in CRACT and the ICTE program is not judicially reviewable, and that policy predates this action by a number of years. Finally, even if shutting down ICTE were a reasonable alternative, and even if that alternative fell within the scope of the proposed hangar and baghouse project, the Court should uphold CRACT's decision to omit shutting down ICTE, because that decision was not arbitrary and capricious.

ARGUMENT

I. NEW UNION'S ASSESSMENT OF PUNITIVE CIVIL PENALTIES AGAINST CRACT IS AUTHORIZED BY THE WAIVER OF SOVEREIGN IMMUNITY PROVIDED BY THE TEXT, LEGISLATIVE INTENT AND PUBLIC POLICY OF THE FEDERAL CLEAN AIR ACT.

The doctrine of sovereign immunity was first introduced into the federal common law of this country in 1819. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). While at least partly rooted in the antiquated notion that the 'king could do no wrong,' the doctrine's contemporary justification is ostensibly the prevention of undue interference in government from lawsuits brought by non-governmental entities.

Unfortunately, sovereign immunity is a substantial obstacle to both substantive and procedural justice, preventing courts from stopping illegal government actions that they would be competent to prohibit among private parties. With no foundation in the Constitution, sovereign immunity appears to be primarily supported by the "four-horse team so often encountered—historical accident, habit, a natural tendency to favor the familiar, and inertia." Kenneth C. Davis, *Sovereign Immunity Must Go*, 22 Admin. L. Rev. 383 (1970).

Recognizing the fundamental inequity of sovereign immunity, Congress has worked diligently to reform the doctrine for the past two decades. This effort has yielded the 1976 amendments to the Administrative Procedures Act and 1977 amendments to certain federal environmental statutes, including the Clean Air Act.

The 1977 Clean Air Act amendments were expressly designed to overturn the expansive interpretation of Clean Air Act sovereign immunity set forth by the Supreme Court in *Hancock v. Train*, 426 U.S. 167 (1976). This design is clearly manifested in the language, history, and policy of the 1977 Clean Air Act amendments, through which Congress unequivocally waived federal sovereign immunity to punitive administrative penalties assessed against federal facilities such as CRACT.

- A. *The text of the Federal Clean Air Act ("CAA") provides a "clear and unambiguous" waiver of sovereign immunity from administrative civil penalties assessed against CRACT for past violations of New Union's federally-approved clean air act program.*

It is well settled that the United States, as sovereign, is immune from suit in the absence of its consent to suit. *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986). Any waiver of that immunity "cannot be implied but must be unequivocally expressed by Congress." *United States v. Testan*, 424 U.S. 392, 399 (1976). New Union does not dispute these principles, but asserts that the plain language of the CAA, under which authority New Union administers its own clean air legislation, clearly expresses the will and intent of Congress to waive the federal government's immunity to the administrative fines that New Union properly imposed against CRACT.

1. *As amended in 1977, the Federal Facilities provision of the Clean Air Act, section 118, expressly waives the sovereign immunity of federal facilities against administrative civil penalties.*

In *Hancock v. Train*, the United States Supreme Court found a lack of evidence that Congress intended the CAA to give the states power to *force* federal compliance with CAA emission standards, even though Congress did intend for federal facilities to meet CAA standards in substance. 426 U.S. at 185-86 (emphasis added). Congress promptly responded by amending the CAA "to overturn the *Hancock* case, and to express with sufficient clarity, the committee's desire to subject Federal facilities to all Federal, State, and local requirements—procedural, substantive, or otherwise—process and sanctions." H.R. Rep. No. 294, 95th Cong., 1st Sess. 199, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1278.

The 'federal facilities' provision of the 1977 CAA Amendments provides, in relevant part:

Each department . . . of the Federal government . . . shall be subject to, and comply with all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner and to the same extent as any nongovernmental entity. The preceding sentence shall apply . . . (c) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies . . . under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty under this title.

42 U.S.C. § 7418 (1988).

The broad language of the above provision leaves no doubt as to the extent of the waiver Congress intended. This provision expressly subjects federal facilities such as CRACT “to the same extent as *any* nongovernmental entity” to “*all* . . . State . . . requirements, administrative authority, and . . . *any* process and sanction, . . . notwithstanding *any* immunity . . . under *any* law or rule of law.” *Id.* (emphasis added). Thus, this amended version of CAA section 118 contains numerous words of inclusion which the Court found lacking in the 1970 version of the CAA considered in *Hancock*. 426 U.S. at 182.

In defending itself against civil administrative penalties in the past, the federal government has asserted that the term “sanctions” in the federal facilities provisions of various environmental statutes refers only to penalties imposed to enforce injunctive relief ordered by a court. *See United States Dep’t. of Energy v. Ohio*, 112 S. Ct. 1627, 1636, 1640 (1992) (Clean Water Act (“CWA”) and Resource Conservation and Recovery Act (“RCRA”)); *Sierra Club v. Lujan*, 931 F.2d 1421, 1425, 1428 (10th Cir. 1990) (CWA and CAA); *Ohio v. United States Dept. of the Air Force*, 17 Env’tl. L. Rep. (Env’tl. L. Inst.) 21210 (S.D. Ohio Mar. 31, 1987) (CAA).

Such an interpretation, however, is not supported by the language of the statute. According to the current legal definition, a sanction is “[t]hat part of a law which is designed to

secure enforcement by imposing a penalty for its violation or offering a reward for its observance." Black's Law Dictionary 1341 (6th ed. 1990). Given this legal definition, it is inconceivable that the word "sanction" would not encompass administrative civil penalties under a statute which subjects the federal government to all and any sanctions, however enforced, to the same extent as any other entity.

In *Ohio v. Air Force*, the district court found that the common usage of the term "sanctions" included penalties and fines, as well as court-ordered injunctive relief. 17 Env'tl. L. Rep. at 21213. The *Sierra Club* court similarly concluded the term sanctions clearly encompassed civil penalties imposed for punitive as well as coercive purposes. 931 F.2d at 1425, 1428.

In *Dept. of Energy v. Ohio*, the Supreme Court determined that Congress did not intend to allow administrative civil penalties against the United States under sanction-authorizing provisions of RCRA and the CWA; this determination is not applicable to the CAA, however. The relevant language of RCRA, as worded in 1992, was textually distinguishable from section 118 of the CAA, and could have arguably limited the phrase "process and sanctions" to only those sanctions required to enforce injunctive relief. 42 U.S.C. § 6961 (Supp. II 1990). No such textual limitation exists in the CAA.

The federal facilities provision of the CWA is admittedly more similar to section 118 of the CAA than was the RCRA provision considered by the Court. The Court's refusal to find a waiver of sovereign immunity as to punitive penalties in the CWA turned, however, on an extremely narrow interpretation of the term "sanctions," coupled with reliance on the CWA's unique requirement that civil penalties either "arise under Federal law" or be imposed to enforce an order of a state or local court.¹ 33 U.S.C. § 1323(a) (1982).

1. It should be noted that Justice White, writing for a three-justice dissent in *DOE v. Ohio*, was highly critical of the majority's "tortured discussion" of the meaning of sanctions. 112 S. Ct. at 1641 (White, J., dissenting). According to Justice White, the plain language of the CWA, taken as a whole, clearly exposed the United States to liability for civil penalties. Immediately after *DOE v.*

The CAA does not stop at merely implicating a waiver of sovereign immunity through the use of broad words and phrases like "any process and sanction." Congress was obviously desirous of ensuring no further judicial misunderstandings when it added the final words of subsection (a)(1)(C): "[t]his subsection shall apply notwithstanding *any* immunity of such agencies, officers, agents, or employees under *any* law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty under this title." (emphasis added). 42 U.S.C. § 7418(a)(1)(C). With these sentences, Congress unequivocally stripped away all possible immunities of all governmental actors, including agencies. Congress then explicitly exempted certain individuals, but not agencies, from one type of applicable sanction, civil penalties.

Traditional rules of statutory construction counsel against constructions which render words or phrases of a statute meaningless. See *California v. United States Dep't of the Navy*, 845 F.2d 222, 225 (9th Cir. 1988). Unless authorization for assessing civil penalties against the federal government exists by virtue of the language of section 118, there could be no possible need to exempt certain governmental actors from those penalties, and the words of exemption would be meaningless.

Furthermore, a statutory provision should be given no construction which renders meaningless the goals of the legislation when taken as a whole. Karl Llewellyn, *Remarks On the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395 (1950). The express intent of the CAA federal facilities provision, that federal and private violators be treated alike, would be frustrated if governmental entities were exempt

Ohio, Congress passed the Federal Facilities Compliance Act of 1992, amending RCRA to more clearly express such an intent. Pub. L. No. 102-386, 106 Stat. 1505 (1992). The Federal Facilities Clean Water Compliance Act, an amendment to the CWA for the same purpose, is currently pending in Congress in response to that "infamous decision" in *DOE v. Ohio*. 139 Cong. Rec. E1720 (daily ed. July 1, 1993)(statement of Rep. DeFazio).

from civil penalties, one of the most commonly used state enforcement tools.

Additionally, if the Clean Air Act does not authorize civil penalties against the federal government, arguably the nation's worst polluter,² it would significantly hinder the 1977 CAA Amendments' goals to "provide greater assistance for State and local governments in the administration of the Clean Air Act," and "to provide more effective . . . enforcement tools for States . . . to bring existing stationary and mobile sources into compliance and to assure that they remain in compliance." H.R. Rep. No. 294, 95th Cong., 1st Sess. 1-2, reprinted in 1977 U.S.C.C.A.N. at 1079.

The federal government itself demonstrated an understanding that the language of the Clean Air Act's amended section 118 waives sovereign immunity from administratively imposed sanctions levied by local air pollution control authorities. *Matter of: Nat. Oceanic & Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standards*, Op. Comptroller Gen. No. B-191747, 1978 WL 9814 (June 6, 1978). In a 1978 opinion, the Comptroller General of the General Accounting Office advised the Justice Department that the National Oceanic and Atmospheric Administration was liable, under the 1977 Amendment to section 118, for a civil penalty imposed by the Puget Sound Air Pollution Control Agency for a violation of local air quality standards. *Id.* at *1. According to the Comptroller General, this penalty was payable from the agency appropriations of the National Oceanic and Atmospheric Agency. *Id.* at *3.

The federal district court in *Alabama v. Veterans Admin.*, 648 F. Supp. 1208 (M.D. Ala. 1986), provided a cogent

2. As of 1988, the Congressional Budget Office estimated that over 2300 federally-owned facilities handled, contained, or generated hazardous waste materials. Thousands of these sites were then known or suspected of noncompliance with applicable federal, state, or local requirements. See *Cleanup at Federal Facilities: Hearings Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2nd Sess. 338 (1988).

summary of the Congressional intent expressed within the text of the CAA:

Given that the statutory sections in question expressly provide that the United States and its agencies shall be subject to suit and that all federal facilities must comply with all state air pollution regulations and that those provisions shall apply notwithstanding any immunity of such agencies, Congress' intention to waive sovereign immunity could not be more clearly established.

Id. at 1211.

2. *The Citizen's Suit provision of the Clean Air Act, section 304, also authorizes New Union's suit for civil penalties against CRACT.*

Section 304 of the CAA, the citizen suit provision of the statute, authorizes "any person" to commence a civil action "against any person (including (i)the United States)." 42 U.S.C. § 7604(a)(1) (1988). Section 302 of the CAA, the general definitions provision, specifically designates individual states, as well the United States and its agencies, as "persons" under the Act. 42 U.S.C. § 7602(e). Furthermore, the 1977 Amendment to section 304 added that:

Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude or restrict any State . . . from . . . (2) bringing any administrative action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof . . . under State or local law respecting control and abatement of air pollution. *For provisions requiring compliance by the United States . . . in the same manner as nongovernmental entities, see section 118.*

42 U.S.C. § 7604(e)(emphasis added).

This latter phrase links the state's right to sue under section 304 with its authority to assess any sanction in section 118 as discussed above. In its 1978 *National Oceanic and At-*

mospheric Agency opinion, cited previously, the Comptroller General noted that "Congress specifically provided for the liability of federal agencies to pay civil penalties administratively imposed by the states when it . . . amended section 304(e) of the Clean Air Act." 1978 WL 9814 (C.G.) at *2.

In 1986, the *Alabama v. Veterans Admin.* court also acknowledged the availability of civil penalties in citizen suits brought by states against federal agencies. 648 F. Supp. at 1211. Significantly, the district court in the present action read section 118 in conjunction with section 304 to find a clear and unambiguous waiver of sovereign immunity in the CAA. (R. at 5.)

Such interpretations are not only textually justified, but also conform to the purposes of the Act as a whole. If citizen suits are to provide effective deterrence against pollution violations, as they are intended, they must implicate civil penalties. Otherwise, such suits would provide little incentive for polluters to comply with standards until the suit was actually commenced. Unless section 304 authorizes citizens to sue for civil penalties against the United States, agency violations will not be deterred.

B. *The legislative history of the 1977 Amendments to the Clean Air Act clearly expresses Congress' intent that the Act waive Federal sovereign immunity from administrative civil penalties.*

When Congress clearly waives sovereign immunity, the judiciary must not thwart Congress' intent by applying an "unduly restrictive interpretation" to such a waiver. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222 (1945). When determining the existence and scope of a waiver, the controlling factor should be "underlying Congressional policy." *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984). Fortunately, the Congressional policy underlying the 1977 Amendments to the CAA is explicit within the legislative history of those Amendments.

In their report to Congress concerning the proposed amendment to section 118, House committee members stated:

The applicable sanctions are to be the same for Federal facilities and personnel as for privately owned pollution sources This means that Federal facilities and agencies may be subject to injunctive relief (and criminal or civil contempt citations to enforce any such injunction), to civil or criminal penalties, and to delayed compliance penalties.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 200, *reprinted in* 1977 U.S.C.C.A.N. 1279. The House's version of section 118 was subsequently adopted by the conference committee and signed into law. Clean Air Act, Pub. L. No. 95-95, s 113, 91 Stat. 685, 711 (1977).

Even if the language of the committee report were not clear, the history behind the House-Senate compromise to craft a single provision further proves that Congress intended that the final version waive federal immunity from civil penalties. The House subcommittee bill introduced in 1975 by Rep. Paul Rogers would have excluded criminal or civil penalties from the sanctions section 118 would have allowed against the United States. H.R. 10498, 94th Cong., 1st Sess. § 113 (1975). Six months later, however, when this bill reemerged from the full committee, the explicit criminal or civil penalty immunity of the subcommittee version was gone, replaced by the phrase "[n]either the United States nor any officer, agent or employee thereof shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such requirement." H.R. 10498, 94th Cong., 2nd Sess. § 113 (1976).

In 1977, a Senate bill appeared with much the same limited waiver as Rep. Rogers' earlier bill. S. 252, 95th Cong., 1st Sess. § 14, *reprinted in* S. Rep. No. 127, 95th Cong., 1st Sess. 177-78 (1977). This bill was not adopted, however; rather, it was the wording from the 1977 House bill making federal facilities subject "to any process and sanction, whether enforced in Federal, State, or local courts or in any

other manner," and "notwithstanding any immunity . . . under any law or rule of law" that ultimately became part of the 1977 Amendments to the CAA. H.R. 6161, 95th Cong., 1st Sess. § 113, reprinted in H.R. Rep. No. 294, 363 (1977).

The Conference committee's acceptance of the House bill's broad waiver, in the face of the more narrow alternative in the Senate bill, removes any suspicion that the waiver mandated in the plain language of 118 could have been inadvertent or unintended. H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 93 (1977).

Courts have relied on this legislative history in finding that the text of the CAA means exactly what it says. The *Alabama v. Veterans Admin.* court cited H. Rep. 294 in deciding that "Congress' intention to waive sovereign immunity could not be more clearly established." 648 F. Supp. at 1211. The *Ohio v. Air Force* court discussed both the House and Senate bills, and noted the Conference agreement statement that "[t]he conferees intend, by adopting the House amendment, to require compliance with all procedural and substantive requirements, to authorize States to sue Federal facilities in State courts, and to subject such facilities to State sanctions." 17 Env'tl. L. Rep. at 21213 (citing H.R. Rep. No. 294, 95th Cong., 1st Sess. 137 reprinted in 1977 U.S.C.C.A.N. at 1518).

Similarly, the 10th Circuit, in *Sierra Club*, agreed with the district court that the language of the House report on the CAA "indicates Congress' intent to waive the United States immunity for civil penalties." 931 F. 2d at 1428 (citing *Sierra Club v. Lujan*, 728 F. Supp. 1513, 1517 (D. Colo. 1990)). Even the Comptroller General noted the House report's specific reference to civil penalties in his opinion that the National Oceanic and Atmospheric Agency was liable to the Puget Sound Air Pollution Control Authority for administrative civil penalties. 1978 WL 9814 (C.G.) at *1. Finally, the district court in the present case also found that the legislative history was instructive of Congressional intent to authorize the penalties New Union requests. (R. at 5.)

In 1949, the Supreme Court acknowledged that "[t]he exemption of the sovereign from suit involves hardship

enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.’” *United States v. Aetna Casualty and Surety Co.*, 338 U.S. 366, 383 (1949)(quoting *Anderson v. John L. Hayes Constr. Co.*, 153 N.E. 28, 29-30 (N.Y. 1926)(Cardozo, J.)). This is an especially important principle in cases involving violations of environmental legislation by the federal government, where the scope of the problem reaches national proportions, and insistence on the continued existence of a broad waiver renders environmental statutes incapable of achieving their intended goals.

C. *Public policy militates in favor of recognizing the broad waiver of federal sovereign immunity expressed by the plain language of section 118 and recorded in its legislative history.*

Deterrence of violations is the primary reason for subjecting federal facilities such as CRACT to civil penalties under environmental statutes. Imposition of civil penalties can put Congress on notice of the penalized agency’s misconduct, immediately focusing Congressional attention on an otherwise obscure federal entity. This is true despite the fact that civil fines paid by agencies usually travel to the coffers of the federal treasury, not the coffers of the state imposing the penalty. See Michael D. Axline et. al., *Stones For David’s Sling: Civil Penalties in Citizen Suits Against Polluting Federal Facilities*, 2 J. Env’tl. L. & Litig. 1, 41 (1987).

Federal agencies, like all bureaucracies, are highly protective of their budgets. If money damages must be paid out of an agency’s own appropriations, the agency will suffer a shortfall in operating funds which will almost certainly come to the attention of Congress when additional appropriations are requested by the agency. If the money comes from the General Accounting Office, an alternative for paying such penalties under certain circumstances, Congress’ own budgetary oversight agency will be forced to go through the process of justifying expenditures for civil penalties, a process which will of necessity involve both the House and Senate in its annual Budget Resolution and Reconciliation process. As

Congress becomes painfully aware of the government's malfeasance, it will pressure offenders to improve their performance. *Id.*

Congress is well aware of the value of fines and penalties as an enforcement tool for national environmental statutes. In 1990, EPA officials testified before the Senate Committee on Environment and Public Works that "penalties serve as a valuable deterrent to noncompliance and to help focus facility managers attention on the importance of compliance with environmental requirements." S. Rep. 101-553, 101st Cong., 2nd Sess. 4 (1990). The Committee also received testimony of state officials from 40 states that civil penalties are necessary to ensure compliance with environmental requirements by federal facilities. *Id.* at 5.

The availability of civil penalties would have the added benefit of preventing compliance delays. Unlike litigation for injunctive relief, state-imposed administrative penalties accrue from the date of assessment, and there is no advantage to long, drawn-out legal procedures. *See* Cong. Budget Office, *Federal Liabilities Under Hazardous Waste Laws*, S. Doc. No. 95, 101st Cong., 2nd Sess. 25 (1990). In fact, the availability of such penalties would likely encourage settlements between citizens and federal agencies. Axline, 2 J. Envtl. L. & Litig. at 43. Not only are civil penalties a potent deterrent of ongoing illegal conduct by agencies threatened with a citizen suit, they serve as an example and warning to others as well. *Id.* at 44.

Cleanup of federal facilities has already cost the federal government billions of dollars. *Cleanup at Federal Facilities: Hearings on H.R. 765 Before the Subcomm. on Transp. & Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 44 (1989). Despite this, federal facilities have repeatedly demonstrated their unwillingness to voluntarily comply with the nation's environmental laws, as was the case with CRACT's willful and knowing violation of NUCAA for over two and one-half years. (R. at 3.)

Without real power to compel environmental compliance and prevent future violations within its borders by CRACT and other federal facilities, New Union simply cannot make

its environmental protection programs work. To support the efforts of state governments in providing a safer, cleaner world for their citizens, Congress' labored mightily to provide a clear waiver of immunity in sections 118 and 304 of the CAA. Because the discharge of pollution is no less harmful when it is spewed from a federal facility, there is no refuge in policy for courts that would undo those labors through adherence to the obsolete doctrine of sovereign immunity.

II. THE ENVIRONMENTAL IMPACT STATEMENT ("EIS") ON THE CONSTRUCTION OF A HANGAR AND BAGHOUSE FOR THE "IMPROVED COAL TRANSPORT EXPERIMENT" ("ICTE"), IS NOT SUBJECT TO JUDICIAL REVIEW FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA"), BECAUSE THAT EIS WAS NOT MANDATED BY NEPA.

Congress enacted the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, to encourage consideration of the environment in agency decision making. *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1277 (9th Cir. 1973). The provisions of NEPA, and the regulations promulgated by the Council on Environmental Quality ("CEQ"), established under the Act to provide regulations for implementing the Act's procedural provisions, require that certain procedures be followed when an agency undertakes a major federal action. *Id.* CRACT fully complied with these requirements on June 26, 1993, when it issued its Finding of No Significant Impact ("FONSI"). (R. at 4). NEPA mandates an EIS only for cases in which a FONSI would be inappropriate. In preparing an Environmental Impact Statement ("EIS") despite its finding of no significant impact, CRACT voluntarily acted outside the requirements of NEPA. CRACT's voluntary preparation of an EIS was therefore an action strictly within the agency's own discretion, and as such is not subject to judicial review for compliance with NEPA.

A. *CRACT met the requirements of both NEPA and the CEQ regulations by preparing a Finding of No Significant Impact.*

NEPA requires that federal agencies prepare a mandatory EIS for any "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Such a NEPA-mandated EIS includes a discussion of "the environmental impact of the proposed action," § 4332(2)(C)(i), and "alternatives to the proposed action." § 4332(2)(iii). The CEQ has set forth guidelines for determining when an agency should prepare a mandatory EIS. 40 C.F.R. § 1500-1508. First, the agency prepares an Environmental Assessment ("EA") setting forth sufficient evidence and analysis to determine whether to prepare an EIS. §§ 1501.3; 1501.4(b)-(c); 1508.9. If the EA shows that an EIS is not needed, the agency must prepare a FONSI. § 1501.4(e). A FONSI sets forth the reasons why the action does not require an EIS. § 1508.13.

CRACT fulfilled NEPA's procedural requirements on June 26, 1993, when it published a FONSI which properly concluded "any operation of ICTE that complied with NUCAA standards would have no significant impact on the human environment." (R. at 4.) Because it was never challenged, (R. at 5), that FONSI completed CRACT's obligations under NEPA. CRACT's decision to prepare an EIS was therefore an entirely voluntary act, implemented at its own discretion.

B. *The EIS prepared by CRACT is not subject to judicial review because it was prepared voluntarily and was not mandated in any way by NEPA.*

A court may only review an agency's action for compliance with NEPA if that agency was compelled to follow NEPA procedures. CRACT issued a FONSI, which was not challenged by Sunpeace or anyone else, and CRACT was therefore not compelled by NEPA to prepare an EIS. Sunpeace now urges this court to review CRACT's voluntary EIS, alleging that CRACT failed to discuss the "no action" alternative required by NEPA. Even if this allegation were true, the

EIS prepared by CRACT is not subject to judicial review for NEPA compliance, because CRACT's voluntary EIS was an agency action which was entirely within its own discretion.

The voluntary preparation of an EIS does not subject an agency to NEPA requirements. *Proffitt v. United States Dep't of Interior*, 825 F. Supp. 159, 163 (W.D. Ky. 1993). In *Proffitt*, the Environmental Protection Agency ("EPA") voluntarily offered assistance in preparing an EIS for a project which was local, and was not a "major federal action." *Id.* The plaintiff alleged that the EIS violated NEPA, and sought judicial review of the adequacy of the EIS and an order requiring a new EIS. *Id.* at 160-61. The *Proffitt* court found that the EPA's voluntary assistance did not cause the local project to become a major federal action, thus NEPA did not apply, and the court therefore did not have jurisdiction to review the EIS. *Id.* at 163. *See also Village of Los Ranchos De Albuquerque v. Barnhart*, 906 F.2d 1477 (10th Cir. 1990)(holding that an EIS prepared by the Federal Housing Administration on a local bridge project was not required to meet NEPA).

CRACT's voluntary preparation of an EIS, which followed its proper issuance of a FONSI pursuant to NEPA and CEQ regulations, does not subject the agency to judicial review of the adequacy of that EIS. Because the FONSI fulfilled CRACT's obligations under NEPA, the agency went beyond those obligations in preparing the voluntary EIS. The Court may only review actions under NEPA which are required by that statute, and the only action which NEPA required of CRACT was the properly issued FONSI. Because Sunpeace failed to challenge that FONSI, this Court lacks jurisdiction to hear a claim based on NEPA.

Courts lack jurisdiction to hear a cause of action based on a voluntarily prepared EIS because NEPA does not provide for an express or implied cause of action. *Mountainbrook Homeowners Assoc. v. Adams*, 492 F. Supp. 521, 529 (W.D. N.C. 1979), *aff'd*, 620 F.2d 294 (4th Cir. 1980). In *Mountainbrook*, the plaintiffs sought to compel the Department of Transportation to comply with a provision included in an EIS the Department had prepared. *Id.* at 522. The court found that NEPA contains neither an express nor implied cause of

action to enforce provisions of an EIS. *Id.* at 526-29. NEPA requires federal agencies to prepare and submit an EIS for major federal action significantly affecting the environment, but NEPA does not create any federal rights in favor of private parties. *Id.* at 528. Because NEPA does not create a cause of action, the court lacked jurisdiction to hear the claim. *Id.* See also *Noe v. Metro. Atlanta Rapid Transit Auth.* 644 F.2d 434 (5th Cir. 1981) (holding that NEPA did not create a private right of action to compel agency to adhere to noise levels predicted by the agency's EIS).

The statement in dicta from *Morgan v. Walter* that an EIS is always reviewable is not applicable in this case. 758 F. Supp. 597, 602 (D. Idaho 1991) The parties in *Morgan* stipulated to the agency preparing an EIS after litigation had begun. *Id.* at 599. In the present case, however, CRACT voluntarily prepared an EIS, not in response to litigation, but merely to provide the public with additional information. (R. at 4.) Unlike the parties in *Morgan*, the record here contains no indication that CRACT agreed with any party to prepare an EIS. On the contrary, the issuance of a FONSI serves as notice under NEPA that no EIS is necessary.

Thus, the June 26, 1994 FONSI served as effective legal notice CRACT had determined that an EIS for the ICTE hangar and baghouse project was not mandated by NEPA. By failing to lodge a timely challenge to the FONSI, Sunpeace and other third parties, indicated acquiescence to the voluntary EIS announced by CRACT. Finally, the stipulation in *Morgan* reserved the right of the plaintiffs to challenge the EIS that defendants prepared. 758 F. Supp. at 602. CRACT, however, made no promise to reserve Sunpeace's right to challenge its voluntary EIS. (R. at 4.)

Denying review of the adequacy of a voluntarily prepared EIS will not prejudice public interest groups. Agencies involve public interest groups at several stages of the NEPA process by involving them in the study process and making findings available to those affected. *Sierra Club v. Hodel*, 848 F.2d 1068, 1094 (10th Cir. 1988). This involvement is required by the CEQ regulations. 40 C.F.R. § 1501.4(b), (e). In addition, public interest groups may challenge an agency's

compliance with NEPA at several junctions, including after the publication of the FONSI. *Sierra Club*, 848 F.2d at 1094. Sunpeace, however, admits that it missed its opportunity to challenge the FONSI. (R. at 5.) The record reflects no reason offered by Sunpeace for this failure.

NEPA is not intended to give citizen groups a general opportunity to air policy objections; that purpose is met by the political process. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). Sunpeace seeks to employ NEPA inappropriately in its policy struggle to encourage a search for jobs based on solar energy.

Subjecting a voluntarily prepared EIS to judicial scrutiny will diminish NEPA's utility in providing useful environmental analysis. *Cabinet Mtns. Wilderness v. Peterson* 685 F.2d 678, 682-83 (D.C. Cir. 1982). In *Cabinet Mtns.*, a federal agency modified a proposal to completely compensate for any adverse impacts to the environment. *Id.* at 680-81. The plaintiff sought a court order requiring that an EIS be completed. *Id.* at 681. The *Cabinet Mtns.* court found that an EIS was not required, and that to require an EIS would undermine the administrative process. *Id.* at 684.

Sunpeace cannot be unfairly prejudiced by the absence of judicial review over an EIS that CRACT was completely free to forego. Rather, it would seriously undermine both the purposes of NEPA, and agency administrative process, if voluntary environmental documents such as the EIS prepared by CRACT were subject to judicial review. Sunpeace had a full and fair opportunity to seek judicial review of the FONSI on the ICTE baghouse and hangar project and failed to take advantage of this opportunity. If this Court now allows judicial review of CRACT's voluntarily prepared EIS, it will undermine the administrative decision making power that Congress gave to the agency. Such judicial review of voluntary agency action will discourage agencies from going the extra mile, above and beyond NEPA's formal requirements, in the way that CRACT has done in this case.

If courts choose to second-guess voluntary agency actions whenever they approach the realm of NEPA, the inevitable result will be that agencies will do no more than what is

strictly required under NEPA. This would limit public access to information on federal actions not technically covered by NEPA, but having environmental implications of interest to the public. If agencies are discouraged from voluntarily preparing environmental documents, the public will simply lose the opportunity to participate in many such government actions affecting the environment.

C. *Under the Administrative Procedure Act, a voluntarily prepared Environmental Impact Statement is not subject to review, because it is prepared solely at the discretion of the agency Act.*

The APA provides a presumption of judicial review of agency actions except in two instances. *Standard Oil Co. v. FTC*, 596 F.2d 1381, 1384 (9th Cir. 1979). The first exception applies if the agency's statutory mandate expressly precludes judicial review. APA § 701(a)(1). It is well established that NEPA does not expressly prohibit judicial review under this first exception. Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations From NEPA's Progeny*, 16 Harv. Envtl. L. Rev. 207, 211-12 (1992). The second exception applies if the "agency action is committed to agency discretion by law." APA § 701(a)(2). The Supreme Court has defined this agency discretion exception as applying when there is no meaningful standard to judge the agency's discretion or, in other words, when there is no law to apply. *Heckler v. Chaney*, 470 U.S. 821 (1985); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The voluntary preparation of an EIS by CRACT falls within this agency discretion exception.

The lack of formal guidelines precludes judicial review of an agency decision. *Ness Inv. Corp. v. United States Dep't. of Agric.*, 512 F.2d 706 (9th Cir. 1975). In *Ness*, the Forest Service denied a special use permit. The court found that neither the authorizing statute nor the applicable regulations offered standards for the agency's decision. Because there was no law to apply, the denial of the permit was not judicially reviewable. *See also Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987) (holding that

there is *now* law to apply, because the Forest Service's new regulations *now* impose specific obligations when issuing a special use permit).

NEPA does not provide formal guidelines for agency actions taken after NEPA procedures have been met. CRACT met the obligations of NEPA when it issued the FONSI. Had Sunpeace sought review of that FONSI, there would be law to apply, because NEPA and CEQ regulations set forth guidelines for issuing a FONSI. Sunpeace, however, did not seek judicial review of the FONSI. Instead, Sunpeace urges the court to now review CRACT's voluntary EIS, effectively asking the court to saddle CRACT with additional procedures not required by any law or regulation.

Courts may not require additional procedures on agencies. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-48 (1978). The APA and NEPA provide the statutory minimum procedures. *Id.* The agency may, of course, utilize additional procedures at its own discretion. *Id.* But, as long as the agency has met the statutory minimum procedure, the court may not overturn the proceeding on procedural grounds. *Id.* at 548. In *Vermont Yankee*, the Supreme Court reviewed the appellate court's decision to strike down the Atomic Energy commission's granting of a license. *Id.* The Supreme Court found, however, that the lower court's scrutiny of the entire record and its finding that the commission had failed to provide "genuine opportunities to participate" was in error. *Id.* The lower court's finding was improper because, in effect, it held that the Commission's procedures were inadequate despite the fact that those procedures met both the APA and NEPA. *Id.* at 541-42. The Court's decision was supported not only by the legislative history of the APA, but also by policy reasons. *Id.* at 545-48. First, by prohibiting courts from proscribing additional procedures, the APA provides some predictability in judicial review. *Id.* at 546. Second, by restricting the availability of judicial review, the rule preserves the advantages of the procedures set forth by NEPA. *Id.* at 547. A policy allowing broader judicial review would compel agencies to utilize a full range of procedures solely to protect

themselves, even when those procedures are not required. This would waste the agencies' time and resources and would allow citizen's groups to in effect have a veto power. Ferester, 16 Harv. Envtl. L. Rev. at 216.

D. *Even if the voluntary EIS prepared by CRACT were reviewable for compliance with NEPA, it was clearly sufficient, because the record establishes that the agency took a hard look at all reasonable alternatives.*

1. *The Court may only consider whether the agency took a hard look at the reasonable alternatives and may not apply the Court's own judgment regarding the choice of those alternatives.*

The preparation of an EIS serves two purposes; 1) the EIS aids the agency's decision whether to proceed with a project by providing disclosure of the project's environmental consequences and 2) the EIS provides the public with information and the opportunity to participate. *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). To meet these goals, NEPA requires that agencies consider alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14. CEQ regulations require that agencies "rigorously explore and objectively evaluate all reasonable alternatives," 40 C.F.R. § 1502.14(a), including the "no action" alternative, § 1502.14(d). In reviewing the adequacy of an agency's discussion of alternatives, courts apply the rule of reason, which asks whether the agency reasonably discussed the significant probable environmental consequences. *Oregon Envtl. Council*, 817 F.2d at 492. The court may not hold an EIS invalid on the basis of inconsequential or technical defects. *Id.*

2. *The EIS prepared by CRACT satisfies all NEPA requirements, because the agency need only consider alternatives reasonably related to the purposes of its project.*

Although a court will invalidate an EIS which fails to consider a viable alternative, an agency need only consider

reasonable alternatives. *Id.* at 815. The agency need only consider alternatives reasonably related to the purposes of the project, 40 C.F.R. § 1502.14, not every remote possibility, *Natural Resources Defense Council, Inc. v. Hughes*, 7 Env'tl. L. Rep. (Env'tl. L. Inst.) 20785, 20788 (D.C. Cir. 1977). In *Natural Resources Defense Council*, the court considered the adequacy of an EIS prepared by the DOI when establishing a new coal leasing program. *Id.* at 20785. The court stated that two types of alternatives must be considered: 1) the no action alternative, and 2) the type of system alternative. *Id.* at 20788. The no action alternative's purpose is to answer the question, "Should the new program be undertaken at all?" *Id.* at 20788-89. The "no action" alternative was not designed to consider shutting down the coal leasing program all together. *See Id.* In fact, no reported cases discuss, as a required alternative, shutting down a facility already in operation. This view is explicitly supported by the CEQ. In its document answering the forty most asked questions about NEPA, the CEQ specifically stated that "no action" does not mean shutting down an ongoing program. 46 Fed. Reg. 18026, 18027 (1981). Despite Sunpeace's assertion that the "no action" alternative was not addressed, according to the above CEQ document, the "no action" alternative would be to not construct the hangar and baghouse. This alternative was addressed by CRACT's voluntary EIS. (R. at 4.)

Furthermore, shutting down the ICTE facility is not within the scope of the agency action proposed by CRACT. This agency action is restricted to the proposal to construct a baghouse and hanger for the ICTE facility. The only alternatives reasonably related to this action must address the issue of whether to go forward with the proposed construction. Whether ICTE is a worthy program is a policy decision, and is therefore entirely beyond the scope of any EIS discussing construction of the baghouse and hangar. This would be true even if the EIS were mandated by NEPA. CRACT, therefore, cannot be required to include shutting down the ICTE program as an alternative in its EIS discussing the construction of its baghouse and hangar.

The purpose of the baghouse and hanger project is solely to bring the ICTE facility into compliance with NUCAA standards. The EIS prepared by CRACT discussed the only two alternatives that are reasonably related to this purpose. First, the EIS discussed the alternative of building the baghouse and hanger. Second, the EIS discussed the "no action" alternative of not building the baghouse and hangar, and instead meeting NUCAA standards by reducing the volume of the ICTE program. No other reasonable alternatives exist. The alternative urged by Sunpeace, that CRACT shut down the ICTE program, is entirely beyond the scope of the project proposed by the agency. That alternative is therefore unreasonable, and not required under NEPA procedures.

3. *The alternative of shutting down ICTE, now urged by Sunpeace, is unreasonable even if it were related to the purposes of the baghouse and hangar project proposed by CRACT.*

Even if the alternative of shutting down ICTE were within the scope of the proposed baghouse and hangar project, it would still be unreasonable. The CRACT facility employs 800 people in Cathertown, and is the principal employer in the area. (R. at 2.) Additionally, CRACT's research activities, including ICTE, are important to the coal industry, which is New Union's major industry. *Id.* Agencies are not required "to elevate environmental concerns over other appropriate considerations," but instead, are required to "take a 'hard look' at the environmental consequences before taking a major action." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). Shutting down ICTE is not only a policy decision beyond the scope of judicial review, it would adversely affect the people of New Union, and potentially devastate the economy of Cathertown.

4. *The Court should uphold CRACT's decision not to consider shutting down ICTE as an alternative in the EIS, unless that decision was arbitrary and capricious.*

Even if the agency could have reasonably decided to discuss the alternative of shutting down ICTE, the court would be compelled to uphold CRACT's decision to omit that alternative, unless CRACT's decision was arbitrary and capricious. Although CEQ regulations require that an agency discuss the reasons for eliminating an alternative from detailed study, § 1502.14(a), courts cannot fly-speck an agency's compliance with NEPA. *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). An EIS that allows the agency to make an informed decision will not be held insufficient on the basis of inconsequential, technical defects. *Id.* The reviewing court must assure only that the agency took a "hard look" at the environmental consequences of its decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The EIS prepared by CRACT the agency to make an informed decision to construct the baghouse and hangar for the ICTE facility, and would not be insufficient even if it were reviewable for NEPA compliance.

CONCLUSION

For the foregoing reasons, the decision of the District Court of New Union holding the Department of Interior's Coal Research Activity liable for civil penalties assessed under the New Union Clean Air Act should be affirmed, and the decision of that District Court subjecting CRACT's voluntary Environmental Impact Statement to judicial review should be reversed.

APPENDIX A

Resource Conservation & Recovery Act (RCRA)

RCRA § 6001, 42 U.S.C. § 6961 - Federal Facilities Provision

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions or *injunctive relief and such sanctions as may be imposed by a court to enforce such relief*), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements . . . *Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.* (emphasis added). This cites to RCRA's section 6001 before its amendment by the Federal Facilities Compliance Act of 1992. Note that this Federal Facilities section mentions "sanctions" only within the confines of enforcing injunctive relief.

APPENDIX B

Clean Water Act

Clean Water Act § 313, 33 U.S.C. § 1323

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 et seq. of Title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties *arising under Federal law or imposed by a State or local court to enforce an order or the process of such court . . .* (emphasis added).

APPENDIX C*Clean Air Act***Clean Air Act § 118, 42 U.S.C. § 7418 - Federal Facilities Provision****(a) COMPLIANCE WITH REQUIREMENTS, ADMINISTRATIVE AUTHORITY, PROCESS, AND SANCTIONS RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION**

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any record-keeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable. . . .

Clean Air Act § 304, 42 U.S.C. § 7604 - Citizens Suit Provision

(a) AUTHORITY TO BRING CIVIL ACTION; JURISDICTION Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf -

- (1) dentagaint any person (including (i) the United States, and (ii) any other governmental instrumental-

ity or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under the chapter of (B) an order issued by the Administrator of a State with respect to such a standard or limitation,

- (2) dentagainst the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or
- (3) dentagainst any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of the chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

...

(e) NONRESTRICTION OF OTHER RIGHTS

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from -

- (1) dentbringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or
- (2) dentbringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title. . . . Clean Air Act § 302, 42 U.S.C. § 7602 - General Definitions Provision When used in this Act - . . . (e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

APPENDIX D

Congressional Record

Comments of Rep. Dingell for the Conf. Rep. on H.R.
2194, Federal Facilities Compliance Act of 1992

Mr. Dingell: Mr Speaker, Federal facilities are among this

country's worst environmental offenders. Their long history of noncompliance with this country's environmental laws, particularly the hazardous waste management requirements under RCRA, has resulted in numerous lawsuits by States against the Federal Government seeking to compel compliance with the law and remediation of the severe environmental problems they have cause. This bill reaffirms Congress' original intent that Federal facilities not only must comply with all of the procedural and substantive requirements of our Federal and State hazardous waste laws, but they, like everyone else, are also subject to fines and penalties for violations of those laws. In doing so, Congress is responding to the recent Supreme Court decision in *United States Department of Energy versus Ohio et al.*, and making the waiver of sovereign immunity as clear and unambiguous as humanly possible. It is our fervent hope that the Supreme Court will heed Justice Byron White and not resort to "ingenuity to create ambiguity" that simply does not exist in this statute. (emphasis added).

Cong. Rec. H9135 (daily ed. Sept. 23, 1992)(statement of Rep. Dingell).

APPENDIX E

National Environmental Policy Act

National Environmental Policy Act of 1969 § 102, 42
U.S.C. § 4332

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall -

...
(C)

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

APPENDIX F

Council on Environmental Quality Regulations

40 C.F.R. § 1502.14 ALTERNATIVES INCLUDING THE PROPOSED ACTION.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the environmental consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1508.13

FINDING OF NO SIGNIFICANT IMPACT

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It

shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.